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IN THE

Supreme Court of the United States

October Term, 1963

No. 212

NORMAN NATHAN SEMLER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

DAVID M. RICHMAN,
301 East Olive Avenue,
Burbank, California 91502,

ROGAN & RADDING,
301 East Olive Avenue,
Burbank, California 91502,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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NORMAN NATHAN SEMLER,

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UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Norman Nathan Semler, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming a conviction of petitioner in the United States Court for the District of Arizona on four counts of a ten-count indictment charging violations of 18 U. S. C. Section 371 and Section 641. The jurisdiction of this Court rests on 28 U. S. C. Section 1254(1).

The indictment charged that petitioner conspired in Count One with all defendants to steal Government

property and to receive stolen Government property. Three additional counts charged the petitioner with receiving, concealing and retaining thirty-four radio receivers-transmitters from salvage airplanes at an air force base in Arizona.

Opinion Below.

The opinion of the Court below and the minute order filed after the petition for rehearing are not yet reported.

Copies of the opinion and the minute order are attached hereto and marked Appendix A.

Grounds on Which the Jurisdiction of This Court Is Involved.

1. The date of the judgment sought to be reviewed and the time of its entry is April 28, 1964.

2. An extension in which to file Petition for Writ of Certiorari was entered on May 18, 1964, extending the time to file said petition to and including June 27, 1964.

3. The statutory provision believed to confer on the United States Court of Appeals for the Ninth Circuit to grant a writ of mandate is Title 28 U. S. C. 1251.

4. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Rule 37, Federal Rules of Criminal Procedure.

Questions Presented for Review.

1. Whether it is a denial of due process of law for the trial judge to give the jury an instruction on the law of criminal conspiracy at the beginning of the trial and to continue to reinstruct the jury on criminal con-

spiracy during the trial on nine different occasions, drumming this highly prejudicial instruction into the jury's mind while the Government was presenting its evidence, in violation of Rule 30 of the Federal Rules of Criminal Procedure.

2. Whether the Trial Court erred in excluding cross-examination of witness Howell, who was an accomplice, concerning sales of property stolen from Davis-Monthan Air Force Base to persons other than the petitioner.

3. Whether the evidence is sufficient to sustain a conviction as to Count I of the Indictment stated upon an alleged conspiracy, and upon Counts V, VII and X of the indictment against the petitioner.

4. Whether the Trial Court erred in failing to grant defendant's motions to dismiss the Indictment, the motion to strike, the motion for change of venue, the motion for severance and for separate trial, the motion for a new trial, and for denying his motion for judgment of acquittal.

Constitutional Provisions and Statutes Involved.

The Fourteenth Amendment of the Constitution provides:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 30, Federal Rules of Criminal Procedure:

"'*Instructions.* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, *but the court shall instruct the jury after the arguments are completed.* No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." (Emphasis added.)

Rule 1, Federal Rules of Criminal Procedure:

"*Scope.* These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54."

Rule 2, Federal Rules of Criminal Procedure:

"*Purpose and Construction.* These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

Reasons for Granting Writ and Arguments Amplifying the Same.

This is a petition for a Writ of Certiorari from the affirmance of a judgment of conviction and a sentence entered on a jury verdict against defendant Semler under an Indictment charging violations of 18 U. S. C. Section 371 and Section 641.

The trial judge began instructing the jury on the law of criminal conspiracy at the beginning of the trial and continued to refer to this instruction and to reinstruct the jury on criminal conspiracy during the trial on nine different occasions, drumming this highly prejudicial procedure into the jury's mind while the Government was presenting its evidence, in violation of Rule 30 of the Federal Rules of Criminal Procedure.

The instructions given by the trial judge are contained in the Record Transcript on page 133, line 16 through page 137, line 22, and are set forth in the Appendix under "B". The nine instances where the trial court referred to the instruction or reiterated the instruction in abbreviated form are also contained in Appendix "B".

The instructions given at the beginning of the trial and the reference to the instruction during the presentation of the Government's case is highly prejudicial and requires reversal of the judgment and sentence.

This was plain error affecting the substantial rights of the defendant Semler. The Appellate Court may take notice on its own motion of the prejudicial error inherent in these charges (Rule 52, F. R. Cr. P.) *Morissette v. U. S.*, 342 U. S. 246. *Smith v. U. S.*, 230 F. 2d 935.

The Federal Rules of Criminal Procedure have the force and effect of statutes and are more than merely rules of Court. Hence these Rules will abrogate contrary principles of common law.

Ochoa v. U. S. (C. C. A. Cal. 1948), 167 F. 2d 341;

United States v. Infusino (C. C. A. Wis. 1942), 131 F. 2d 617;

Bolger v. U. S. (D.C. N.Y. 1960), 189 F. Supp. 237, affirmed 293 F. 2d 368, reversed on other grounds 371 U. S. 392.

The Court of Appeals for the Ninth Circuit, in *Babson & Trial v. U. S.*, case No. 18,410, decided April 8, 1964, discusses the effect of instructing the jury prior to the arguments, contrary to Rule 30 F. R. Cr. P., on page 7 of the slip decision:

> "We are unable to understand why the trial judge chose to ignore Rule 30, and certainly do not sanction that irregular procedure. It is essential to the administration of justice that a jury scrupulously follow the law as given to it by the judge, and to that end his instructions should be clear and firmly fixed in the mind of each juror. And if supplemental instructions are given, the better practice undoubtedly is for the judge to expressly advise the jury that such instructions constitute only a part of the entire charge and must be considered equally with the earlier ones. Here he refused to do this. *In both instances the trial judge clearly erred* but in neither was the error of sufficient magnitude to warrant a reversal of the judgment. The most that appears is action premature by a few hours." (Emphasis added.)

In the *Babson & Trial* decision the Ninth Circuit Court of Appeals found that the error was not sufficiently strong to warrant a reversal of the judgment because the trial court's instruction to the jury was premature by a few hours. In our case the premature instructions in violation of Rule 30 began with the second witness and continued unremittingly and relentlessly for days during the presentation of the Government's case, presumably creating in the mind of the jury a devastating effect and undoubtedly calling for a conviction of the petitioner on the charge of criminal conspiracy.

The Ninth Circuit Court of Appeals filed an Order in our case on April 28, 1964, following petitioner's request for a rehearing and amplified its opinion in this case by adding the following:

> "Appellant construes Rule 30 as prohibiting the giving of any instructions to the jury until after arguments are completed. The question here is not whether the district court may, contrary to Rule 30, give its instructions to the jury before argument instead of afterwards. We have recently held such practice to be error. *Babson & Trial v. U. S.*, (9 Cir. 1964) ....F. 2d .....
>
> "The question here is whether Rule 30 precludes the court from instructing the jury during trial in addition to the appropriate giving of instructions after argument. Rule 30 cannot be construed as preventing the court from appropriately cautioning the jury as to the limited competence or relevance of evidence as such evidence is received."

See Appendix "A" page 4.

The Circuit Court below definitely holds that Rule 30 prohibits the giving of any instructions to the jury until after the arguments are completed, and that it is error for a court to do so. It apparently mistakenly held that the instruction given by the trial judge in our case during the presentation of the Government's case over a period of days was merely "cautioning the jury as to the limited competence or relevance of the evidence as such evidence is received." Stretching Rule 30 into such a mistaken construction is most unfortunate for petitioner and for thousands of other defendants in criminal cases, and for that reason we believe it would be proper for the Supreme Court to examine this question and determine the limits to which trial courts may go in disregarding the Federal Rules of Criminal Procedure in criminal trials. Due process and a fair and just trial are involved in this case as well as many other cases tried before juries in the Federal Courts.

An example of the remarks made by a trial judge which led to the conviction of a defendant is the case of *United States v. Allegretti*, decided April 22, 1964 in the United States Court of Appeals for the Seventh Circuit. This court reversed conspiracy convictions of four defendants on the ground that the trial judge went too far in explaining his ruling on the admission of evidence and in effect told the jury that he believed the government had proved the "connection" necessary to support the conspiracy.

With one judge dissenting, the Seventh Circuit ruled that the trial judge said more than he should have in this statement. The court conceded that the judge had a duty to rule on the objections, but, it continued, "we know of no requirement that the court state to the jury its *reasons* therefor. . . . [T]he expression of the court's reasons did have the effect of suggesting to the jurors that the court believed that a conspiracy existed, and for that reason invaded the province of the jury." (Emphasis added.)

One judge concurred specially in order to answer the dissenting opinion's comments about the jury system, which, he contended, "can be preserved and protected only by permitting it to operate without interference by the trial court."

United States v. Allegretti (7 Cir. 1964) .... F. 2d .... (April 22, 1964).

The Ninth Circuit decisions in our case and in *Babson and Trial* (*supra*) is in direct conflict with the Seventh Circuit decision in *United States v. Allegretti* (*supra*) on the extent to which a trial judge may go in commenting to the jury on the competence and relevance of evidence as such evidence is received by the jury.

In giving instructions, there is necessarily a wide range of discretion vested in the trial judge, who must clearly and accurately state the rules of law by which the jury is to be guided in its deliberations, while at the same time avoiding confusion and distraction of

matters likely to lead the jury away from the issues it is called upon to decide.

United States v. Grunewald (C. A. N.Y. 1956), 233 F. 2d 556, reversed on other grounds, 353 U. S. 391.

But this discretion in a trial judge does not permit him to commence instructions at the beginning of the trial and to refer to these instructions many times during presentation of the Government's case in violation of Rule 30 F. R. Cr. P.

The Supreme Court has supervisory power to formulate and apply proper standards for enforcement of criminal law in the Federal Courts.

Marshal v. U. S., 360 U. S. 310;
McNabb v. U. S., 318 U. S. 332;
Bruno v. U. S., 308 U. S. 287.

In reversing a conviction for murder in *McNabb v. U. S.*, 318 U. S. 332 at 347, the Supreme Court stated:

". . . We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. *The history of liberty has largely been the history of observance of procedural safeguards, and the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.*" (Emphasis added.)

We believe that the Supreme Court should review this case because the point raised is new and sufficiently important and meritorious to warrant a discussion of

the observance by trial judges of the Federal Rules of Criminal Procedure as a safeguard to defendants in all criminal cases. Chief Justice Vinson, in an address before the American Bar Association, September 7, 1949, 69 S. Ct. v,vi stated:

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country."

In preparing this Petition for Certiorari we have attempted to apply the Supreme Court's own standards and not because our client has induced or compelled us to do otherwise. The Court has ultimate power to review all federal court decisions, and it has over-all supervisory responsibility for the administration of civil and criminal justice in the federal courts, especially when plain error has been committed.

It is submitted that if certiorari is granted in this case on the ground that the instructions given to the jury by the trial judge during the presentation of the Government's case is in violation of Rule 30 of the Federal Rules of Criminal Procedure, the Petitioner's brief on appeal will cover fully the remaining questions heretofore presented for review in this Petition for Certiorari.

Conclusion.

It is respectfully submitted that this case is unique and of first impression where an injustice has been done because a judicial mistake was made. Thousands of defendants are tried in the United States District Courts on criminal indictments. Unless a clear-cut decision by the Supreme Court indicates that the Federal Rules of Criminal Procedure must be followed to insure defendants due process and a fair trial, serious miscarriages of justice will follow.

Wherefore, Petitioner prays that this Honorable Court grant certiorari and review and reverse the Orders of the Court below.

Respectfully submitted.

DAVID M. RICHMAN,
Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Norman Nathan Semler, Appellant, vs. The United States of America, Appellee. No. 18,705.

Mar. 16, 1964.

Upon Appeal from the United States District Court for the District of Arizona.

Before: Barnes, Merrill and Koelsch, Circuit Judges.

Merrill, Circuit Judge:

Appellant stands convicted of conspiracy to steal and receive Government property in violation of 18 U. S. C., Section 371, and, in three counts, of having received Government property knowing it to be stolen, in violation of 18 U. S. C., Section 641.

Appellant asserts that the evidence was insufficient to sustain a conviction as to count 1, the conspiracy count, or as to counts 5, 7 and 10, the substantive counts.

In support of this assertion appellant relies solely on his own testimony to the effect that he did not know that the property purchased had been stolen. Evidence of knowledge was presented through testimony of Sergeant Howell (as to the entire period of the conspiracy as well as to the incidents covered by counts 5, 7 and 10), and Sergeant Wooldridge (as to the latter part of the conspiracy period and the incidents covered by counts 5, 7 and 10). It is apparent that the jury chose to believe these Government witnesses rather than

appellant. With knowledge thus established there was ample evidence of guilt, not only of the substantive counts but of the conspiracy as well.

Appellant asserts error in the court's permitting Sergeant Howell to invoke the privilege of the Fifth Amendment and refuse to testify on cross-examination as to sales of stolen property to others than appellant. Appellants' position is that the witness had waived the privilege by testifying freely on direct examination as to the period of time involved.

We are satisfied that there was no waiver. The cross-examination in question was on a subject not gone into on direct.

Appellant asserts that he was denied a fair trial in that he was denied a severance and was subjected to a mass trial with those who had participated in the thefts. The motion for severance was made and argued more than a month before trial. It was based upon the ground that there was no relation between the substantive counts and the conspiracy counts. It was properly denied upon this ground. The indictment demonstrated that the overt acts involved in count 1 were also involved in the substantive counts.

Appellant's motion was not thereafter renewed. If, for any reason other than that asserted, severance should have been granted the right was waived.

Appellant asserts that adverse publicity denied him a fair and impartial jury. There is nothing in the record to support this contention. The court individually questioned those jurors who admitted having read or heard of the case, and none of them admitted to an opinion. There is no evidence or any indication at all

that any juror read or heard accounts of the trial during trial. The jury was adequately cautioned against reading newspapers or listening to radio or television.

Appellant asserts error and denial of fair trial in the court's instructing the jury on conspiracy during trial. It is not suggested that the instruction itself was erroneous. It is argued that it came too soon and too often, with the result that the fact that the case involved an alleged conspiracy was prejudicially drummed into the jury's consciousness.

However, out of fairness to the defendants the jury could not be permitted to forget that they were concerned with an alleged conspiracy, and that the competence of certain evidence as to certain defendants depended upon a determination that a conspiracy existed. Not only was it entirely proper to instruct the jury periodically in this fashion, it might well have been prejudicial error not to do so.

Finding no error, judgment is affirmed.

The court has unanimously concluded that the inclusion of the foregoing opinion in the published law reports would serve no public purpose. It therefore directs the clerk that this opinion be not submitted for such publication.

Order.

In the United States Court of Appeals for the Ninth Circuit.

Norman Nathan Semler, Appellant, vs. The United States of America, Appellee. No. 18,705.

(Endorsed) Filed Apr. 28, 1964. Frank H. Schmid, Clerk.

Upon Petition for Rehearing

Before: Barnes, Merrill and Koelsch, Circuit Judges.

It is Ordered as follows:

1. Rehearing is denied.

2. The opinion is ordered modified by the inclusion of the paragraphs hereinafter set forth, said paragraphs to be included at the conclusion of the opinion prior to its final sentence:

> "Appellant construes Rule 30 as prohibiting the giving of any instructions to the jury until after arguments are completed. The question here is not whether the district court may, contrary to Rule 30, give its instructions to the jury before argument instead of afterwards. We have recently held such practice to be error. *Babson & Trial v. U. S.* (9 Cir. 1964) .... F. 2d .....
>
> The question here is whether Rule 30 precludes the court from instructing the jury during trial in addition to the appropriate giving of instructions after argument. Rule 30 cannot be construed as preventing the court from appropriately cautioning the jury as to the limited competence or relevance of evidence as such evidence is received."

As so modified, the opinion to be submitted for inclusion in the published law reports.

Stanley N. Barnes
Charles M. Merrill
M. Oliver Koelsch
Circuit Judges

APPENDIX B.

Instructions Given by Trial Judge at the Beginning of the Trial.

"R.Tr. 133, line 16, through 137, line 22:

"The Court: Members of the Jury, at this time I am going to give you an instruction or instruct you as to your consideration of an application of evidence that may be introduced in th case, and there will be a difference between the evidence that is offered under the conspiracy count or count 1 and evidence that may be offered as to the substantive counts, that is count 2—there is no count 3—and counts 4 through 10.

"I will begin by telling you that when several defendants are on trial ordinarily there is admissible against each defendant evidence of only his own acts and evidence of an act done by a co-defendant or another person may not be considered by the jury as against the defendant not doing the act. In such a case ordinarily, also, a statement is made outside court by one defendant or by another person, may not be considered as evidence against a defendant not present when the statement was made. This, as I say, is the rule ordinarily applicable to evidence introduced in this case with respect to count 2 or count 4 through 10, the substantive counts. With respect to any of those counts, evidence of an act done or a statement made outside of court by one defendant or another person may not be considered by you as evidence against another defendant not present when the act was done or the statement

was made. When, however, two or more persons associate themselves together in a conspiracy, that is, a combination or agreement to violate the law, there arises from the very act of associating themselves together for such a purpose a kind of partnership in which each party to the combination or agreement is the agent of every other party to the plan. Consequently, in a case where the evidence shows beyond a reasonable doubt a conspiracy or a common plan or arrangement to violate the law, entered into between two or more persons, evidence as to an act done or a statement made by one is admissible as against all, provided the act be done knowingly and the statement be made knowingly during the continuance of the conspiracy and in furtherance of an object or a purpose of the conspiracy. With regard only to count 1 of the indictment in this case, the count which charges all of the defendants with conspiracy, I instruct you that if you find from the evidence beyond a reasonable doubt that the defendants or some of them entered into a conspiracy as charged in count 1, to steal, take and carry away, and to receive and conceal, have and retain, with intent to convert to their own use and gain, certain property of the United States Air Force, the evidence as to any act done or statement made by one of the defendants who was a party to the conspiracy is admissible against all who were parties to the conspiracy, provided the act was knowingly done or the statement was knowingly made, during the continuance of the conspiracy. In order to establish proof that a conspiracy existed, as charged in count 1, the

evidence must show beyond a reasonable doubt that the parties to the combination or plan or agreement in some way or manner, or through some contrivance positively or tacitly came to a mutual understanding to try and accomplish their common object or purpose. In order to establish proof that a particular defendant was a party to or a member of a conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was formed and that the defendant knowingly participated in the conspiracy with the intent to advance or further some object or purpose of the conspiracy. In determining whether or not a particular defendant was a party to or a member to a conspiracy, the jury is not to consider what others may have said or done. That is to say, the membership of a defendant in a plan or arrangement or agreement must be established by evidence of his own conduct, what he himself said or did. Thus, with regard to count 1, if and when, but only if and when, it appears from the evidence beyond a reasonable doubt that a conspiracy did exist and that a defendant was one of the parties thereto, then the acts thereafter knowingly made by a defendant likewise found to be a party to the conspiracy, may be considered by the jury as evidence in the case as to the defendant found to have been a party, even though the acts or statements may have occurred in the absence of and without the knowledge of such defendant, provided such acts or statements were knowingly done or made during the continuance of the conspiracy and in order to further an object or a purpose of the conspiracy.

"With regard to counts 2 and 4 through 10, evidence admitted of any act done by one person will not be considered by you as evidence against any other person, unless the latter was present and heard the statement made.

"That is the rule of evidence that is applicable in the matter. Of course the issue of whether or not there was a conspiracy cannot be settled with one sentence, one witness or anything else, but you will have to bear in mind what must be established, as I have explained it to you, before you will be permitted to consider the act or statement, or statement of one defendant or another person outside of the presence of that other person. You will have to apply it in accordance with the rules I have just given."

In the following instances, during the presentation of the Government's case, the Trial Judge admonished the jury concerning the evidence and ruled on objections referring to the foregoing instruction given to the jury on criminal conspiracy at the beginning of the trial:

I.

In R.Tr., Vol. I, pg. 173, lines 14 through 20, the trial judge ruled on an objection and stated the following:

"The Court: A continuing objection. The objection is overruled and the jury will not consider this conversation or these statements against any of the defendants as far as count 2 or counts 4 through 10 are concerned. And you will consider it or not with regard to count 1 in accordance with

the instructions which the Court gave you earlier regarding the acts and statements of a co-conspirator."

II.

In R.Tr., Vol. III, pg. 640, lines 13 through 16, the Trial Judge ruled on an objection and stated the following:

"The Court: No, it's admitted under Count One.

Q. (By Miss Diamos) Go ahead.

"The Court: The jury will consider it in the light of the instructions given you heretofore."

III.

In R.Tr. Vol. III, pg. 912, lines 2 through 7, the trial judge ruled on an objection:

"The Court: The objection is overruled. As to count 1 it would be admissible, as to the act. All of the overt acts in the conspiracy do not have to be set out but proof on the other overt acts may be made. I will instruct the jury though that this witness' testimony as to this transaction will be considered only as to count 1."

IV.

In R.Tr., Vol. V, pgs. 1145, line 25 and 1146, lines 1 to 16, the trial judge ruled on the admissibility of an exhibit as follows:

"The Court: The exhibit will be received. The objection is overruled. It will be received as to all defendants on count 1, the conspiracy count. It will be considered by the jury under the instructions given you heretofore in regard to when the

act or declarations of one whom you find to have been a conspirator are binding upon and evidence against another as to whom you find he was a member of the conspiracy. In other words, give the exhibit consideration in count 1 as to a defendant, or will not give consideration to it as to a defendant in accordance with your findings in the instructions heretofore in consideration of evidence of acts and declarations of conspirators.

"With respect to the defendant Semler, the exhibit is received on counts 5, 7 and 10, but it is not received as against any other defendant on any other count. You will not consider it as to any other defendant or any other count. That will be on either counts 2, 4, 6, 8 or 9."

V.

In R.Tr. Vol. V, pgs. 1149 line 14 through 25, and pg. 1150, line 1 through 3, the trial judge made a ruling and stated the following:

"The Court: These exhibits will be received, with the same reservation. In other words, members of the jury, you will consider them as against —consider them or not as against the defendants in count 1, in accordance with your findings as to whether or not there was a conspiracy, and whether the exhibits show an act or admission or declaration by a conspirator during the course of the conspiracy and in furtherance of it, and whether a defendant as to whom you may consider it was a member of the conspiracy at that time. The instructions given you heretofore with regard to the evidence in the conspiracy count. As to the

remainder of the counts, the exhibits are received against the defendant Semler on counts 5, 7, and 10, but are not evidence of any kind against the other defendants on any other count than count 1."

VI.

In R.Tr., Vol. V, pg. 1150, line 5 through 25, the trial judge interrupted a question and made the following statement and reiterated an instruction concerning conspiracy:

"The Court: Mr. Muecke, maybe matters have gone along so long that maybe I should again reiterate for the jury the essence of the instruction I gave them with reference to count 1 so we may refresh their recollection.

"This is the substance of what I told you before, I told you at length, but this is the essence of it. That was with regard only to count 1 of the indictment in this case, the count that charges all of the defendants with conspiracy. I instruct you that if you find from the evidence beyond a reasonable doubt that the defendants or some of them entered into a conspiracy, as charged in count 1, to steal, take and carry away the personal property of the United States Air Force, and to receive, conceal, have and retain with intent to convert to their own use and gain, certain property of the United States Air Force, then the evidence as to any acts done or statements made by one of the defendants who was a party to the conspiracy is admissible against all who were party to the conspiracy, providing the act was knowingly done or

statement knowingly made during the continuance of the conspiracy and in furtherance of the object and purpose of the conspiracy."

VII.

In R.Tr. Vol. V, pg. 1159, line 13 through 25, the trial judge again reiterated the instruction to the jury on conspiracy:

"The Court: These may be received as to all defendants, as to count 1, subject to the jury's considering or not considering as against the individual defendants in accordance with the instructions heretofore given to the jury. In other words, members of the jury, if you find from the evidence beyond a reasonable doubt that a conspiracy did exist at the time charged in count 1 of the indictment, and if you find that this exhibit is evidence of an act or an admission or declaration of one of the conspirators, made during the existence of the conspiracy and in the furtherance of a purpose or object of the conspiracy, then you may consider the exhibit on count 1 as to any other defendant whom you find beyond a reasonable doubt to have been a member of the conspiracy at that time."

VIII.

In R.Tr. Vol. V, pg. 1160, line 2 through 6, the trial judge further stated the following:

"The exhibit will further be considered by the jury and admitted as against the defendant Semler on counts 5, 7, and 10, but not admitted against any other defendant and will not be considered as to any other defendant on any count other than count 1."

IX.

In R.Tr. Vol. VI, pg. 1606, line 20 through 25, and at pg. 1607, line 1 through 7, the trial judge stated the following:

> "The Court: The Exhibits 39 through 46 which have just been admitted in evidence will be considered by the jury as to all defendants on count 1. You will treat it as evidence against the defendants in count 1 in accordance with your determination under the rules heretofore given you, with regard to whether or not, first, there was a conspiracy, and, next, that a defendant was a member of the conspiracy, and, finally, th.. the exhibit constitutes evidence of an act or a declaration as to the members of the conspiracy and during the existence of the conspiracy. The exhibits will also be considered as against the defendant Kirves on count 9 and the defendant Semler on count 10, and they will not be considered as to any other defendant on any other count."

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738-993—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 212

NORMAN NATHAN SEMLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. 32)[1] is reported at 332 F. 2d 6.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1964, and a petition for rehearing was denied on April 28, 1964. By order of Mr. Justice Douglas, the time for filing the petition for a writ of

[1] The record lodged with the Clerk consists of 9 volumes. "R." refers to volume 1, which contains the proceedings in the court of appeals and miscellaneous documents connected with the trial proceedings. "Tr." refers to volumes 2 through 9, which contain the transcript of the trial.

certiorari was extended to and including June 27, 1964. The petition for a writ of certiorari was filed on June 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court committed plain error by giving cautionary instructions concerning the jury's consideration of the declaration of an alleged co-conspirator at the time such evidence was admitted as well as in the final charge to the jury.

STATEMENT

A ten-count indictment returned in the United States District Court for the District of Arizona charged that from May 20, 1961, to June 24, 1962, petitioner and others conspired, in violation of 18 U.S.C. 371, to steal and receive electronic equipment owned by the United States Air Force, in violation of 18 U.S.C. 641 (Count 1), and that on three occasions in March and May 1962 petitioner and one Edsel Howell received electronic equipment, knowing it to have been stolen from the United States Air Force, in violation of 18 U.S.C. 641 (Counts 5, 7, and 10). Petitioner was convicted by a jury on each of the four counts.[2] He was fined $5,000 on Count 1 and $10,000 on Count 5, and was sentenced to imprisonment for two and one-half years on Count 7 (R. 22). Imposition of sentence on Count 10 was

[2] Of the twenty other co-conspirators named in the indictment, the eight who were not named as co-defendants had pleaded guilty to substantive offenses. The case was dismissed as to one of the remaining twelve, five pleaded guilty to the conspiracy, and six were tried and convicted with petitioner.

suspended for five years and petitioner was placed on probation (R. 22). The court of appeals unanimously affirmed the convictions (Pet. App. A).

The evidence disclosed that petitioner was the owner of Semler Industries, Inc., a California company engaged in the selling of surplus materials purchased from military bases throughout the country (Tr. 2033–2034, 2039). Petitioner personally conducted the buying for the company (Tr. 2038–2039). In 1961 and 1962 petitioner made several purchases of radio equipment and sextants from one Edsel Howell (Tr. 1257–1258, 1261–1262, 1266–1269, 1271–1272, 1279–1292), an Air Force sergeant stationed at Davis-Monthan Air Force Base in Tucson, Arizona (Tr. 1248), with whom petitioner had had business dealings a few years earlier (Tr. 2040–2044, 2051–2055, 2075, 2212, 2220–2222). The evidence is undisputed that during 1961 and 1962 Howell was the leader of a conspiracy involving numerous persons at Davis-Monthan Air Force Base, that the conspirators stole electronic equipment from storage sites and airplanes and delivered it to Howell, and that it was this equipment that Howell sold to petitioner. Petitioner acknowledged the purchases from Howell, but testified that he did not then know that the items were being stolen (Tr. 2195–2196). Howell testified that in telephone conversations in which the code words "suitcases" and "eyeglasses" were used for "radios" and "sextants" (Tr. 1272–1273), petitioner told him what sort of equipment he could use (Tr. 1270, 1273–1274); that in one instance petitioner told Howell he wanted a certain number of specified instruments

which petitioner accurately described as located in a particular storage bin on the base, but petitioner cautioned Howell not to take too great a risk (Tr. 1275, 1408, 1431–1432); that several deliveries were made to petitioner in parking lots, and, at petitioner's request, in the desert (Tr. 1275–1276, 1279–1280, 1285–1286, 1288); and that in certain of their conversations indirect and direct reference was made to the fact that the equipment was stolen (Tr. 1298–1299, 1408, 1421–1422, 1432). Petitioner paid Howell for the equipment after each delivery; Howell retained approximately one-third of the proceeds, and two-thirds was distributed among the others involved in the thefts (Tr. 1269–1270, 1282, 1353, 1427).[3]

The trial of petitioner and six co-defendants lasted 17 days.[4] On the morning of the second day a government attorney asked a witness to relate the substance of a conversation with one of the co-defendants (Tr. 132–133). The attorney for petitioner objected on the grounds that "it is irrevelant and immaterial, no foundation, and calls for hearsay" (Tr. 133). In response to an inquiry by the court, the government attorney stated that the matter was being offered against all defendants on the conspiracy count (Tr. 133). The court thereupon gave the jury a caution-

[3] On cross-examination, Howell was permitted to invoke his Fifth Amendment privilege and refuse to testify concerning sales of stolen property to persons other than petitioner, a matter not gone into on direct examination (Tr. 1386–1388, 1410–1413).

[4] Over a month before trial petitioner moved for a severence (R. 9). The motion was denied (R. 10), and was not thereafter renewed.

ary instruction to the effect that, on the substantive counts, the statement could be considered only against the declarant, and that on the conspiracy count the statement could be considered against the co-defendants only if a conspiracy between the declarant and the co-defendants were shown to have existed beyond a reasonable doubt, and only if the statement were knowingly made during the pendency of the conspiracy and in furtherance of the conspiracy (Tr. 133–137). No objection either to the giving of the instruction or to its substance was made by any of the attorneys for the defendants.

A few minutes later, another statement of the same declarant was offered against all defendants on the conspiracy count (Tr. 141–142), and the court reminded the jury that the scope of its consideration of the matter would be controlled by the limiting instruction previously given (Tr. 142). In proceedings outside the hearing of the jury, petitioner's counsel objected to the admission of the statement on the same basis previously urged (Tr. 142). While he said that "The instructions which the Court just read to the jury were proper" since it would "guide their approach to the evidence as it is given during the course of the trial" (Tr. 142), he objected that the evidence should not be admitted at that time as the government had not yet made a prima facie showing of a conspiracy (Tr. 142–143). The objection was overruled (Tr. 144).

At subsequent points during the trial the jury was again reminded of the limited situation in which declarations of the individual defendants could be

considered against the others (Tr. 173, 640, 912, 1145–1146, 1149–1150, 1156, 1159–1160, 1606, 1607). In several of these instances the proffered evidence was plainly admissible against petitioner individually, and his counsel announced that he had no objection to its introduction (Tr. 1145, 1148, 1159, 1606). In the charge to the jury after final arguments of counsel the court reiterated the conditional consideration to be given the declarations and acts of co-conspirators (Tr. 2569–2571, 2592). In doing so the court read verbatim petitioner's requested instructions on the point (Tr. 2569–2571, 2592; R. 15(2), 15(7)).

ARGUMENT

Petitioner's contention that the trial court committed plain error in giving cautionary instructions at the time evidence of the conspiracy was admitted, in addition to such an instruction in the final charge, is without merit. The propriety of the charge per se is not attacked; indeed petitioner's trial attorney characterized it as proper (Tr. 142), and its import was identical to that of the final instructions requested by petitioner. Petitioner apparently argues only that a jury should not be informed of the limited consideration it might give evidence of conspiracy until moments before deliberation on the verdict.

First, petitioner did not object to the timing of the instructions at the trial even though the judge repeated the caution each time evidence of declarations was introduced. Rather, while objecting to the admission of some of the evidence on the

ground that the conspiracy had not been proved, petitioner's counsel agreed that the instructions were proper to guide the jury's "approach to the evidence as it is given during the course of the trial" (Tr. 142). At the very least, even if the timing of the instructions were erroneous, it is not the kind of plain error or defect affecting substantial rights which may be noticed under Rule 52(b) of the Federal Rules of Criminal Procedure even though not brought to the attention of the trial court.

Second, it is clear that the trial court's action was entirely proper. It is usual for trial judges to give cautionary instructions at the time evidence is introduced. This is done because, if consideration of evidence is to be limited effectively in a lengthy trial of several defendants, the limitation should be announced at the time the evidence is admitted. As noted by the court below: "Not only was it entirely proper to instruct the jury periodically in this fashion, it might well have been prejudicial error not to do so" (R. 32(3)). See *Lutwak* v. *United States*, 344 U.S. 604, 618.

The cases cited by petitioner are inapposite. In *Babson* v. *United States*, 330 F. 2d 662 (C.A. 9), contrary to the provisions of Rule 30, F.R. Crim. P., the court gave its entire charge before final arguments of counsel.[5] Here the court, at the time government evidence was admitted, simply cautioned the jury of the limited application to be given that particular

[5] Such a procedure was found to be error, but not reversible error.

evidence, and subsequently at the proper time gave its complete charge, including a reiteration of the instruction in language requested by petitioner. In *United States* v. *Allegretti*, C.A. 7, decided April 22, 1964, the court instructed the jury that previously admitted evidence might be considered against all co-defendants, using language conveying the impression that the court believed a conspiracy to have been shown. In the present case, the instructions* made no such suggestion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

JULY 1964.

* The other questions, which are raised by petitioner but not argued in his petition, were decided adversely to him by the court below and do not warrant further review.